In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1183

ELECTRONIC SYSTEMS INVESTMENT CORPORATION, PETITIONER

v.

SMALL BUSINESS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

On September 21, 1966, the Small Business Administration (SBA) issued an Order to Show Cause why petitioner, a small business investment company licensed under the Small Business Investment Act (15 U.S.C. 661 *et seq.*), should not be ordered to cease and desist from violating Sections 306 and 312 of the Act (15 U.S.C. 686, 687d), and Sections 107.708 and 107.716 of the SBA's implementing regulations,[1] and

[1] 13 C.F.R. 107.708 (and 15 U.S.C. 686) prohibits a small business investment company (SBIC) from extending financ-

why an order should not issue suspending petitioner's license under the Act and providing other appropriate relief (Pet. App. D-1). Specifically, petitioner was charged, *inter alia*, with (a) extending financing to Technical Animations, Inc. at a time when its own president and 44-percent stockholder was also a director of that company, and (b) without obtaining prior SBA approval, extending financing to two other corporations, each in an amount greater than 20 percent of petitioner's paid-in capital and surplus.

After a hearing on these charges, the SBA ultimately determined that petitioner had violated the aforementioned regulations. Accordingly, an order was entered on February 5, 1968 (Pet. App. C-1) directing petitioner to cease and desist from violating the Act and regulations. The order also directed divestiture of the illegal investments in Technical and suspended petitioner's license under the Act pending compliance with the order (Pet. App. C-5 - C-6).

Petitioner thereafter applied to the Court of Appeals for the Fourth Circuit, pursuant to 15 U.S.C. 687a(e), to have the Administration's order set aside. In a *per curiam* opinion, that court denied the petition, ruling that the challenged order was supported by substantial evidence and was not contrary to law (Pet. App. A-2).

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ing in an amount greater that 20 percent of its paid-in capital and surplus to any one small business concern. 13 C.F.R. 107.716, a conflict of interest provision implementing 15 U.S.C. 687d, prohibits, in the absence of prior SBA approval, an SBIC from extending financing to a company which has, *inter alia*, a common director with the SBIC.

1. The thrust of petitioner's argument is nothing more than a claim that the court of appeals erred in ruling that the SBA order was supported by substantial evidence. It is settled, however, that the question of the substantiality of supporting evidence in such a case is one which "Congress has placed in the keeping of the Court of Appeals." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491; *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401. Moreover, there is nothing in the record to suggest that the court below failed to apprehend the controlling legal principles or to assess properly the substantiality of the evidence in light of those standards.

2. Petitioner also calls into question the SBA's choice of remedy, contending that it was "drastic" for the Administration, after ordering it to divest itself of all investments in Technical, to suspend its license temporarily until divestiture had been effected (Pet. 12-15). However, this course of action is expressly authorized, in clear terms, in 15 U.S.C. 687a (b). That section provides that when a licensee has not complied with the provisions of the Act or the Administration's regulations, in addition to issuing a cease and desist order and requiring the licensee to take such other action as would insure compliance with the Act's provisions, the Administration "may also suspend the license of such licensee until the licensee has complied with such order." Moreover, an administrative agency has wide discretion in selecting the sanction it views as necessary and appropriate in carrying out its statutory responsibilities in a particular case. Judicial review here "extends no further

than to ascertain whether the [agency] made an allowable judgment in its choice of the remedy." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611-612; see also *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 364; *American Power Co.* v. *Securities & Exchange Commission*, 329 U.S. 90. 118. Here the agency choice of remedy was plainly a permissible one,[2] and there was no showing of any abuse of administrative discretion.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1969.

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[2] Noting that petitioner had been violating the Act for over two years and that the SBA had sought corrective action for many months, the agency properly took petitioner's "pattern of behavior" and "the series of violations wilfully committed" by it into account in framing its order (Pet. App. C-4). Petitioner moreover continued to engage in these practices while aware that the SBA considered its earlier loans to Technical to be violations of the Act (see Pet. App. C-3 - C-5).

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